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CHARLES ELMOR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

Nos. 711 and 721.

BENJAMIN F. JOHNSON,

Petitioner,

against

MANHATTAN RAILWAY COMPANY *et al.*,

Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

Respondent,

against

INTERBOROUGH RAPID TRANSIT COMPANY,

Respondent.

IN THE MATTER

of the

INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENT WILLIAM ROBERTS, AS RECEIVER FOR MANHATTAN RAILWAY COMPANY

CHARLES E. HUGHES, JR.,
ALLEN S. HUBBARD,
Counsel for Respondent William Roberts, Receiver for Manhattan Railway Company.

April, 1933.

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Opinions Below

The opinion of the District Court (R. 694-721) is reported in 1 Fed. Supp. 809.

The opinion of the Circuit Court of Appeals (R. 1024-1035) is reported in 61 F. (2d) 934.

Jurisdiction

The orders of the Circuit Court of Appeals were entered on December 14, 1932, and the final order of that Court for mandate was entered on December 29, 1932 (R. 1036, 1047). The petitions of Johnson and the intervenor Boehm for certiorari to review the orders were filed respectively on February 17, 1933 and February 23, 1933, and were granted March 20, 1933 (R. 1049). The jurisdiction of this Court rests on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Statement

For a full statement of the facts we refer to the briefs of the respondent The American Brake Shoe and Foundry Company and of the respondents Victor J. Dowling and Thomas E. Murray, Jr., as Receivers for Interborough Rapid Transit Company. The following is a sufficient statement of those facts which relate particularly to the position of William Roberts, as Receiver for the Manhattan Railway Company:

On August 26, 1932, The American Brake Shoe and Foundry Company filed a bill of complaint in the United States District Court for the Southern District of New York against Interborough Rapid Transit Company, alleging, among other things, the inability of the Interborough to pay its debts and asking the appointment of re-

ceivers. The Interborough filed its answer on the same day admitting the allegations of the bill. On the same day Hon. Martin T. Manton, Senior Circuit Judge, having theretofore designated himself to hold a term of the District Court and particularly to hear and determine all applications and proceedings in that cause, made and filed an order appointing Victor J. Dowling and Thomas E. Murray, Jr., Receivers for the Interborough. The order appointing the Receivers provided " * * * that any applications or petitions for orders or instructions or otherwise in this cause shall be made to the undersigned in chambers or otherwise, the undersigned hereby reserving full right and jurisdiction over this cause and any and all proceedings therein" (R. 183-184).

Substantially all of the property owned by Manhattan Railway Company was under lease to the Interborough for a term of 999 years, under the provisions of which the Interborough received the earnings from the leased property, assuming, however, obligations, among other things, to pay all taxes levied against the Manhattan property, interest on its bonds and certain dividends on its stock. After the appointment of the Receivers for the Interborough, the Manhattan considered that its interests and those of its security holders required the extension of the protection of a court of equity over its property. The property under lease was then in the possession of the Interborough Receivers. Acting under the authority of *Re Metropolitan Railway Receivership,* 208 U. S. 90, the Manhattan, by its own counsel, filed its petition for intervention in the American Brake Shoe case and for the extension of the receivership to its property (R. 248-255). Judge Manton appointed William

Roberts Receiver for the Manhattan on September 6, 1932 (R. 196).

It was held by the District Court that because the original application by the American Brake Shoe and Foundry Company for the appointment of receivers for the Interborough was made to Judge Manton, as Senior Circuit Judge designated to hold a District Court, instead of to the District Judge holding the motion part, the original appointment of Receivers for the Interborough was wholly void and that all proceedings thereafter taken in the American Brake Shoe case, including the appointment of William Roberts as Receiver for the Manhattan, were likewise wholly void.

Apart from their discussion of the above question, which we believe to be the only one properly before this Court, petitioners in their briefs make numerous statements with respect to alleged improprieties in the appointment of Mr. Roberts as Receiver for the Manhattan and his alleged unfitness for that office. These statements, where they have any basis at all in the record, rest solely upon allegations in the bills of complaint. The allegations in question were explicitly and circumstantially denied in two affidavits of Mr. Roberts which were before the District Court (R. 665-679). It would not, we submit, be proper to make such allegations, so denied, the basis of summary relief in advance of trial. The following are the statements referred to and references to the denials in Mr. Roberts' affidavits:

The brief of the petitioner Johnson (pp. 38, 63) refers to allegations that the receiverships of both the Interborough and Manhattan were brought about pursuant to an understanding or conspiracy to which Mr. Rob-

erts was a party. The original affidavit of Mr. Roberts stated categorically (R. 674) that he "had no knowledge or intimation that a receivership of the Interborough Company was contemplated until after the appointment of the receivers therefor on August 26, 1932", and this is circumstantially amplified in his supplemental affidavit (R. 675-676).

The brief of the petitioner Boehm states (p. 11) that the appointment of Mr. Roberts as Manhattan Receiver was sponsored by Interborough-Brooklyn-Manhattan Transit interests and (p. 52) that he was in close accord with the management of the Interborough. Mr. Roberts' affidavit (R. 666-669) denied categorically the imputation that he is connected with or dominated by Brooklyn-Manhattan Transit Company-Interborough interests, sets forth in detail the circumstances of his connection with the Manhattan and denies, so far as his knowledge extends, any sponsoring of his appointment as receiver by anyone.

This affidavit also denies (R. 671) the allegations, frequently referred to in the brief, that the Manhattan has been under the domination and control of Interborough and explains completely (R. 669-671) the allegations of interlocking directors. Under the Plan of Readjustment of 1922, payment of dividends upon the assenting stock of Manhattan was made dependent on earnings, and it was provided that Manhattan should have the right to nominate three of Interborough's eighteen directors. These three directors, who were put on the Interborough Board by Manhattan to protect the interests of Manhattan stockholders, are those who the brief of petitioner Boehm (p. 3) intimates dominate Manhat-

tan in the interests of Interborough. There was only one interlocking director apart from this arrangement, Mr. Charles L. Hayden.

The record shows consistent effort on the part of the Manhattan Receiver to prevent any action that might lead to the result, frequently referred to in the brief of this petitioner, that the Interborough might get rid of the Manhattan lease through defaulting on rental obligations and permitting the first mortgage upon the properties of the Manhattan to be foreclosed, with the consequent wiping out of the interests of its second mortgage bondholders and stockholders. The brief states (p. 12) that the Interborough Receivers defaulted on the payment of interest on the Manhattan's first mortgage on October 1, 1932, and that this would have caused foreclosure had not Judge Manton "on the application of the Mortgage Trustee, and on the recommendation of Basil O'Connor, as Special Master, on the last day of the grace period directed the receivers to make payment". As a matter of fact, it appears in the printed record before this Court that it was Mr. Roberts, as Receiver, who filed the petition on September 28, 1932, demanding payment of this interest (R. 366-372), which, with the petition of the Interborough Receivers for instructions in the premises (R. 329-343), formed the basis for Judge Manton's opinion (R. 539-544) and order referring the question to the Special Master. The brief also states, outside of the printed record before this Court, but in accordance with the actual record in the American Brake Shoe case, that on April 1, 1933, the first mortgage interest again fell due and the Interborough Receivers have again suffered a default placing the Manhattan bondholders

and stockholders again in the same jeopardy. Explaining this, we similarly state that Mr. Roberts, as Receiver of the Manhattan, filed on March 31st a petition demanding the payment of this interest as well as all rentals under the Manhattan lease, thereby raising for a prompt adjudication the question whether the Manhattan lease is subject to disaffirmance at all by the Interborough Receivers. There is no basis at all for any intimation that the Manhattan Receiver has not been energetic in his efforts to save the Manhattan properties from foreclosure.

The statements in the brief of petitioner Boehm (p. 38) with respect to Mr. Roberts' alleged neglect of duty as president, director and counsel of the Manhattan, and the alleged resulting cause of action against him and his co-directors are dealt with in his affidavits (R. 671-674, 678-679). The proceedings in the American Brake Shoe case, subsequent to the preparation of the printed transcript of record before this Court, show that these allegations, and the other allegations above referred to, have been made the basis of an application to Judge Manton on behalf of the Manhattan Railway Company (the management of which was changed at the last annual meeting of stockholders) by its present counsel (who is the same as the chief counsel for the petitioner Johnson herein) for the removal of Mr. Roberts as Receiver and the appointment in his place of Mr. Nathan L. Amster, its new president, who (R. 568) had theretofore been a director and closely allied with the Company. This application has been referred by Judge Manton to the Special Master and hearings thereon are now proceeding before him. It appears from the affidavit of J. Osgood Nichols

in the record before this Court that the same counsel, then appearing for a Manhattan common stockholders' protective committee of which Mr. Amster was a member, had urged upon Judge Manton at the time that Mr. Roberts was appointed on September 6, 1932, the appointment of Mr. Amster as an additional receiver (R. 566-571).

Argument

It is not our purpose to duplicate or parallel the argument in the briefs of the American Brake Shoe and Foundry Company and of the Interborough Receivers, to which we refer for a detailed presentation of the questions involved and a discussion of the applicable authorities.

It was conceded by Judge Woolsey that the District Court had jurisdiction of the cause of American Brake Shoe and Foundry Company against Interborough Rapid Transit Company (R. 712). It was likewise conceded that Judge Manton was duly designated under Section 18 of the Judicial Code (U. S. Code, Title 28, Sec. 22) to hold a District Court for the Southern District of New York (R. 698).

Under Section 19 of the Judicial Code (U. S. Code, Title 28, Sec. 23) he was empowered as a judge so designated to "discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed" and all his acts and proceedings had "the same effect and validity as if done by or before the district judge of the said district." Unless validly limited, those powers plainly included jurisdiction to appoint receivers.

The only limitations asserted are contained in new Rules 1-a and 11-a adopted by the eight district judges. Authority for the adoption of those rules is to be found, if at all, in the permission accorded District Courts by Section 731 of Title 28 of the United States Code to make rules regulating practice provided, among other things, they are "not inconsistent with any law of the United States", or the permission granted to the district judges by Section 23 of the Judicial Code (U. S. Code, Title 28, Sec. 27) to agree upon the division between them of the business of the Court.

The questions presented are, first, whether a Circuit Judge duly designated to hold a District Court under the statutory authority above cited was affected at all by such rules; and, second, if he was, whether his failure to comply with them deprived him, as held by the District Court, of all "judicial competence" and made his acts not those of a judge either *de jure* or *de facto* but of a usurping individual and so *coram non judice* and void. Both questions must be answered in the affirmative before the decision of the Circuit Court of Appeals may be reversed.

At the time when the Manhattan Railway Company made its application for intervention, the first question had already been determined by Judge Manton. His appointment of receivers for the Interborough necessarily involved a decision that he was not bound by Rules 1-a and 11-a adopted by the district judges. The decision of Judge Woolsey that he was so bound proceeds upon a construction of Sections 18 and 19 of the Judicial Code that they merely authorize the designated Circuit Judge to enter the district court, but that what he may do in that court is wholly dependent upon the wish of the dis-

trict judges who may wholly exclude him from acting in the very matter or matters in which the public interest was deemed to require that he do act. We submit that the manifest policy of this legislation does not permit such an interpretation.

We can add nothing to the language of the Circuit Court of Appeals (R. 1029-1030, 1032-1033) concluding that the recital of public interest by the Senior Circuit Judge may not be made the subject of independent inquiry. Nor is the distinction attempted by petitioners between a general designation by him of a Circuit Judge to sit in the District Court and a designation to hear a particular matter an admissible one. It is readily conceivable that under the statute the Chief Justice of the United States or a Circuit Justice, or a Senior Circuit Judge, might find a more compelling reason in the public interest to make a designation covering a particular case than to make a general designation. We submit that Judge Manton's power as a Circuit Judge duly designated to hold a District Court was not impaired by Rules 1-a and 11-a of the District Judges and that, in this view, his so-called division of business order is of no importance.

If, however, it should be held, in agreement with Judge Woolsey, that when a designated Circuit Judge proceeds to sit in the District Court "he must obey its rules", of the sort here involved, the question of the effect of non-compliance remains.

Unless Rules 1-a and 11-a are to be given effect as the equivalent of statutes prescribing limitations upon judicial power, parties like the Manhattan Railway Company which were affected by the appointment of receivers

for the Interborough and desired to intervene for the protection of their own interests, were not only entitled but required to recognize the validity of the existing proceeding and had no standing to raise any question of mere irregularity, if one existed, in the proceeding before the judge to whom under the original order and under Rule 4 of the Equity Rules of the District Court of the Southern District of New York all subsequent applications must be made.

There is, it is submitted, a wide difference between a rule of practice and a jurisdictional statute. The authority to pass rules of practice cannot be deemed to give authority to prescribe the jurisdiction of judges. When it is said that a valid rule of practice has all the validity of a statute, it is meant that such a rule of practice has the validity and effect of a statute relating to practice. The disregard or violation of a statute relating to practice does not mean loss of jurisdiction. So, also, the disregard or violation of a rule of practice enacted pursuant to legislative authority cannot mean loss of jurisdiction.

Even if Judge Manton, as a duly designated Judge holding a District Court, was subject to Rules 1-a and 11-a, the effect of a disregard of these rules by him cannot be more serious than a corresponding disregard of such rules by a District Judge. If a District Judge, not sitting in the motion part, should appoint receivers in violation of Rule 11-a, the appointment would not be void but would be a mere irregularity of practice. If this were not so, the business of the court could hardly go on. No one would be entitled to rely upon any order in any receivership unless he first ascertained that the receiver had been appointed by a Judge sitting in the motion part of the court.

It is submitted that the District Court was in error in ascribing to the alleged violations of Rules 1-a and 11-a by Judge Manton a loss of judicial competence to make valid and effective orders, and that its orders, which proceeded upon this theory, were properly reversed by the Circuit Court of Appeals.

Respectfully submitted,

CHARLES E. HUGHES, JR.,
ALLEN S. HUBBARD,
Counsel for Respondent William Roberts, Receiver for Manhattan Railway Company.

April, 1933.

RESPONDENT'S BRIEF

FILE COPY

Supreme Court of the United States

October Term, 1932.
Nos. 711 and 731.

BENJAMIN F. JOHNSON, *Petitioner*,

against

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LILLIAN BOEHM, *Petitioner*,

against

MANHATTAN RAILWAY COMPANY, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENTS

Van S. Merle-Smith and Others, as the Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Bonds.

PAXTON BLAIR,
Counsel for Van S. Merle-Smith and others, as the Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Bonds.

BOYKIN C. WRIGHT,
CLIFTON MURPHY,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1932.

Nos. 711 and 721.

BENJAMIN F. JOHNSON,
Petitioner,

against

MANHATTAN RAILWAY COMPANY, *et al.*,

LILLIAN BOEHM,
Petitioner,

against

MANHATTAN RAILWAY COMPANY, *et al.*,

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENTS

Van S. Merle-Smith and Others, as the Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Bonds.

This brief is filed on behalf of Van S. Merle-Smith and others as a Protective Committee for the holders of Manhattan Railway Company Consolidated Mortgage 4% Bonds. The Committee duly intervened in the District Court, pursuant to an order obtained for that pur-

pose (R., 201). The principal facts have been adequately set forth in the briefs filed by the other Respondents.

In addition to what seem to us to be controlling doctrines of law and of practice (discussed at length in the briefs of certain of the other Respondents) for affirming the decision of the Circuit Court of Appeals, we respectfully urge upon this Court that the confused and chaotic condition which has existed in the Interborough-Manhattan Receivership, as a result of the Johnson suit, makes it of the highest importance in behalf of the vast body of interested and intervening security holders, that this Court should not upset the existing receiverships.

As we see it, the Court is here presented with a situation where the administration of property belonging to creditors has been carried on for almost eight months under judicial supervision and authority, and where the only challenge made concerns not the existence of that authority but merely a difference of opinion as to the wisdom with which that authority has been exercised. Here the senior Circuit Judge, duly designated and sitting as a District Judge, has appointed Receivers of the properties and has assumed their administration. Bondholders and other creditors have intervened in the only forum open to them; various questions vitally affecting these creditors have been presented and settled, and others are now before Judge MANTON and call for prompt disposition if irreparable damage to creditors is not to ensue.

It is earnestly urged that the preservation and the orderly determination and disposition of the rights of these creditors are superior to any conflict or disagreement

between the various judges charged with the administration of equity matters in the Southern District of New York. We further contend that if the authority and jurisdiction of the Judge administering the receiverships are to be challenged at all, the challenge should, in the interest of orderly procedure, have been by a direct attack, and that this Court should not permit a collateral attack. The damaging and disastrous consequences of such an attack are already apparent in the unfortunate confusion and chaos now manifest in these proceedings. The Court should therefore take no step which would perpetuate rather than relieve that confusion and chaos.

This Respondent wishes to call to the especial attention of this Court the brief filed by the Corporation Counsel on behalf of the City of New York as *amicus curiae*, and to ask that this Court give attentive hearing to the important considerations there presented. In all receiverships of traction properties, and pre-eminently in this particular receivership, the interests of the City and of the public represented by the City are necessarily a matter of the greatest concern to the courts. These considerations of public interest have been fully presented in the brief of the Corporation Counsel and we feel that it would be both unnecessary and inappropriate for us to add anything on this score or to set forth at length our own interpretation of these considerations.

However, from the point of view of the holders of the Consolidated Mortgage bonds of the Manhattan Railway Company and in their behalf, we desire respectfully to point out to the Court that the vested property rights of these bondholders, as well as the rights of the City of New York referred to in the brief of the Corporation

Counsel, will be seriously injured or at least endangered if these receiverships be used as instrumentalities to accomplish the disaffirmance of the Manhattan lease and thus cause the disruption of the entire system of jointly-operated subway and elevated lines. Accordingly, while we earnestly urge upon this Court that the existing receiverships be continued and the Johnson bill be dismissed, we respectfully ask, not only for the protection of the rights and interest of the City referred to by the Corporation Counsel, but also for the protection of the property rights of the Manhattan Bondholders, that this Court should direct, or otherwise impose as a condition of affirming the order under review, that in the conduct of these Federal Receiverships the Interborough Receivers should not be permitted to disaffirm the Manhattan lease or cast adrift the elevated lines, and thus make impossible the performance of the franchise obligations of the Interborough Company arising from its various contracts with the City of New York.

Dated, New York, N. Y., April 15, 1933.

Respectfully submitted,

PAXTON BLAIR,
Counsel for Respondents Van Santvoord Merle-Smith and others, as the Protective Committee for Manhattan Railway Company Consolidated Mortgage Four Per Cent. Gold Bonds.

BOYKIN C. WRIGHT,
CLIFTON MURPHY,
of Counsel.